Supreme Court, U.S.
FILED
JUN 30 1992
OFFICE OF THE CLERK

92-80

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1991

GUY WILLARD TOOKER

Petitioner,

V.

UNITED STATES OF AMERICA

Respondent,

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

Respectfully submitted,

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Attorney for Petitioner
Guy Willard Tooker

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QUESTIONS PRESENTED

1. CAN THE GOVERNMENT ESTABLISH A WILLFUL VIOLATION OF THE TRADING WITH HE ENEMY ACT (TWEA) ON THE BASIS OF THE FACT THAT THE TWEA REGULATIONS ARE PUBLISHED AND AVAILABLE? IF SUCH PROOF IS INSUFFICIENT, IS THERE SUFFICIENT EVIDENCE TO SUSTAIN THE PETITIONER'S CONVICTION?

2. BY NOT REQUIRING THE GOVERNMENT TO PROVE THAT THE PETITIONER HAD ACTUAL KNOWLEDGE OF THE SPECIFIC REGULATIONS AND DELIBERATELY VIOLATED THE TWEA, DOES THE OPINION BELOW CONFLICT WITH THE HOLDING OF THE ELEVENTH CIRCUIT IN UNITED STATES V. FRADE, 709 F.2D 1387 (11TH CIR. 1984) WHICH REQUIRED ACTUAL KNOWLEDGE OF THE SPECIFIC REGULATIONS AS WELL AS A DELIBERATE VIOLATION OF THE TWEA TO SUSTAIN A CONVICTION?

LIST OF PARTIES

1. United States of America, Respondent
2. Mr. Guy Willard Tooker
3. Mr. Roy John Scott
4. Mr. Bao Ich Tran
5. Mr. Khanh Cong Tang
6. Mr. Robert C. DeBrophy
7. Mr. Binh Vin Tran

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2. By not requiring the Government to prove that the Petitioner had actual knowledge of the specific regulations and deliberately violated the TWEA, does the opinion below conflict with the holding of the Eleventh Circuit in United States v. Frade, 709 F.2D 1387 (11th Cir. 1984). Which required actual knowledge of the

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UNITED STATES OF AMERICA

Respondent,

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PRAYER

The Petitioner, **GUY WILLARD TOOKER** respectfully prays that a Writ of Certiorari be issued to review the Judgment and Opinion of the United States Court of Appeals for the Fifth Circuit issued March 30, 1992.

OPINIONS BELOW

On March 30, 1992, the United States Court of Appeals for the Fifth Circuit entered its opinion affirming the judgment of conviction in this case. United States v. Tooker, 957 F.2d 1209 (5th Cir. 1992). A copy of the opinion of the United States Court of Appeals for the Fifth Circuit is attached as Appendix A. On May 8, 1992, the United States Court of Appeals for the Fifth Circuit denied the Petitioner's suggestions for panel rehearing. A copy of the denial is attached as Appendix B.

A copy of the judgment and sentence of the district court is attached as Appendix C. (Tooker). The district Court did not issue a written opinion in this case.

STATEMENT OF JURISDICTION

On March 30, 1992, the United States Court of Appeals for the Fifth Circuit entered its opinion affirming the judgment of conviction in this case.

Jurisdiction of the Court is invoked under Section 1254(1), Title 28, United States Code.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The fifth amendment to the United States Constitution provides in pertinent part:

> No person shall . . . be deprived of life, , liberty, or property, without due process of law . . .

. The Trading with the Enemy Act provides in pertinent part:

(b) (1) During the time of war, the President may, through any agency that he may designate, and under such rules and regulation as he may prescribe, by means of instructions, licenses, or otherwise -

> (A) investigate, regulate, or prohibit, any transaction in foreign exchange, transfers of credit or payments between, by, through, or to any banking institution, or the importing, exporting, hoarding, melting, or earmarking of gold or silver coin or bullion, currency or securities, and
>
> (B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition holding withholding, use, transfer, withdrawal, transportation, importation or

> exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or national thereof has ny interest,

by any person, or with respect to any property , subject to the jurisdiction of the United States; and any property or interest of any foreign country or national thereof shall vest, when, as, and upon the terms, directed by the President, in such agency or person as may be designated from time to time by the President, and upon such terms and conditions as the President may prescribe such interest or property shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of any for the benefit of the united States, and such designated agency or person may perform any and all acts incident to the accomplishment or furtherance of the purposes . . .

Whoever shall willfully violate any of the provisions of this Act [sections 1 to 6, 7 to 39 and 41 to 44 of this Appendix] or of any license, rule, or regulation issued thereunder, and whoever shall willfully violate, neglect, or refuse to comply with any order of the President issued in compliance with the provisions of this Act [said sections' shall, upon conviction, be fined not more than $50,000, or, if a natural person, imprisoned for not more than

ten years, or both; 50 U.S.C. App. Sections 5 (b) (1), 16

Section 500.201 of Title 31 of the Code of Federal Regulations provides:

Transactions involving designated foreign countries or their nationals; effective date.

(a) All of the following transactions are prohibited, except as specifically authorized by the Secretary of the Treasury

(or any person, agency, or instrumentality designated by him) by means or regulations, rulings, instructions, licenses, or otherwise, if either such transactions are by, or on behalf of, or pursuant to the directions of any designated foreign country, or national thereof, or such transactions involve property in which any designated foreign country, or any national thereof, has at any time on or since the effective date of this section had any interest of any nature whatsoever, direct or indirect;

(1) All transfers of credit and all payments between, by, through, or to any banking institution or banking institutions wheresoever located, with respect to any property subject to the jurisdiction, of the United States or by any person (including a banking

institution) subject to the jurisdiction of the united States.

(2) All transaction in foreign exchange by any person within the United States; . .

(3) The exportation or withdrawal from the United States of gold or silver coin or bullion, currency or securities, or the earmarking of any such property, by any person within the United States.

(b) All of the following transactions are prohibited, except as specifically authorized by the Secretary of the Treasury (or any person, agency or instrumentality designated by him) by means of regulations, rulings, instructions, licenses, or otherwise, if such transactions involve property in which any designated foreign country, or any national thereof, has at any time on or since the effective date of this section and any interest of any nature whatsoever, direct or indirect;

(1) All dealings in, including, without limitation, transfers, withdrawals, or exportations of, any property or evidences of indebtedness or evidences of ownership of property by any person subject to the jurisdiction of the United States; and

(2) All transfers outside the United States with regard to any property or

property interest subject to the jurisdiction of the United States.

(c) Any transaction for the purpose or which has the effect of evading or avoiding any of the prohibitions set forth in paragraph (a) or (b) of this section is hereby prohibited.

(d) The term "designated foreign country" means a foreign country in the following schedule, and the terms "effective date" and "effective date of this section" mean with respect to any designated foreign country, or any national thereof, 12:01 a.m. eastern standard time of the date specified in the following schedule, except as specifically noted after the country or area.

Schedule

(1) North Korea, i.e., Korea north of the 38th parallel of north latitude; December 17, 1950.
(2) Cambodia: April 17, 1975.
(3) North Vietnam; i.e., Vietnam north of the 17th parallel of north latitude: May 5, 1964.
(4) South Vietnam, i.e., Vietnam south of the 17th parallel of north latitude: April 30, 1975, at 12:00 p.m. e.d.t.

31 C.F.R. §500.201

Section 500.204 of Title 31 of the Code of Federal Regulations provides:

> Importation of and dealings in certain merchandise.
>
> (a) Except as specifically authorized by the Secretary of the Treasury (or any person, agency, or instrumentality designated by him) by means of regulations, or rulings, instructions, licenses, or otherwise, persons subject to the jurisdiction of the United States may not purchase, transport, import, or otherwise deal in or engage in any transaction with respect to any merchandise outside the United States specified in following paragraph (a)(1) of this section.
>
> (1) Merchandise the country of origin of which is North Korea, North Viet-Nam, Cambodia, or South Viet-Nam. Articles which are the growth, produce or manufacture of these areas shall be deemed for the purposes of this chapter to be merchandise whose country of origin is North Korea, North Viet-Nam, Cambodia, or South Viet-Nam, notwithstanding that they may have been subjected to one or any combination of the following processes in another country:
>
> (i) Grading; (ii) testing; (iii) checking; (iv) shredding; (v) slicing; (vi) peeling or splitting; (vii) scraping; (viii) cleaning; (ix) washing;

(x) soaking; (xi) drying; (xii) cooling, chilling or refrigerating; (xiii) roasting; (xiv) steaming; (xv) cooking; (xvi) curing; (xvii) combining of fur skins into plates; (xviii) blending; (xix) flavoring; (xx) preserving; (xxi) pickling; (xxii) smoking; (xxiii) dressing; (xxiv) salting; (xxv) dyeing; (xxvi) bleaching; (xxvii) tanning; (xxviii) packing; (xxix) canning; (xxx) labeling; (xxxi) carding; (xxxii) combing; (xxxiii) pressing; (xxxiv) any process similar to any of the foregoing. Any article wheresoever manufactured shall be deemed for the purposes of this chapter to be merchandise whose country of origin is North Korea, North Viet-Nam, Cambodia, or South Viet-Nam, if there shall have been added to such articles any embroidery, needle point, petit point, lace or any other article of adornment which is the product of North Korea, North Viet-Nam, Cambodia, or South Viet-Nam, notwithstanding that such addition to the merchandise may have occurred in a country other than North Korea, North Viet-Nam, Cambodia, or South Viet-Nam.

31 C.F.R. §500.204

Section 500.563 of Title 31, of the Code of Federal Regulations provides:

Certain transactions incident to travel to and in North Korea, North or South Vietnam or Cambodia.

(a) Travel transactions by individuals. The following transactions are authorized:

(1) All transactions by individuals ordinarily incident to their own travel to and from any foreign country designated under §500.201 of this part.

(2) All transactions by individuals ordinarily incident to their own travel in any foreign country designated under §500.201 of this part, including payment of living expenses and the acquisition of goods for personal consumption there.

(3) The purchase in any foreign country designated under §500.201 of this part, and importation as:

(d) Use of Charge Cards. (1) unless specifically provided, neither this section nor any general or specific license contained in or issued pursuant to this section authorizes persons subject to U.S. jurisdiction to utilize charge cards, including, but not limited to, debit cards, credit cards or other credit facilities; for expenditures in a country designated pursuant to §500.201 of this part. Such transactions are prohibited by §500.201.

(2) This section does not authorize the processing and payment by persons subject to U.S. jurisdiction, such as charge card

issuers or intermediary banks, of charge card instruments (e.g., vouchers, drafts, or sales receipts) for expenditures in any country designated pursuant to §500.201 of this part. Also, it does not authorize a domestic charge card issuer, or a foreign charge card firm owned or controlled by U.S. persons, to deal with an enterprise owned or controlled by a foreign country designated under §500.201 of this party; a national of such a foreign country; or a third country party, such as a franchisee, in connection with the extension of charge card services to any person in one of the countries designated under §500.201 of this part.

31 C.F.R. § 500.563

STATEMENT OF THE CASE

COURSE OF PROCEEDINGS

The Petitioner, **GUY WILLARD TOODER**, his codefendants, Robert C. DeBrophy, Roy John Scott, Khanh Cong Tang, and Bao Ich Tran, were convicted of conspiring to violate the Trading With the Enemy Act ("TWEA"), in violation of 50 U.S.C. Appendix, Section 5(b); 31 C.F.R. Sections 500.201, 500.204, 500.404, 500.701, 505.10; 18 U.S.C. Section 371. The trial court sentenced **TOOKER** to one year imprisonment and a $119,306.36 fine.

TOOKER timely appealed. The United States Court of Appeals for the Fifth Circuit affirmed his conviction and denied his motion for panel rehearing.

STATEMENT OF THE FACTS

In October of 1989 the United States Customs Service began investigating Khanh Tang pursuant to informant information that he and others were attempting to affect the sale of goods from Vietnam. Agent Gessner arranged a meeting with Mr. Tang and assumed the identity of one Greg Osterman. Gessner was unaware that trade between U.S. citizens and specified countries was prohibited until he familiarized himself with the law during this investigation. (15 R. 38-39)

On December 11, 1989 Gessner and Tang met at James Coney Island Restaurant in Houston where they discussed the potential purchase of military equipment from sources in Vietnam. (10 R. 31, 60) This was followed by another meeting on December 12, 1989 and

on December 13, 1989, agent Gessner met with Khanh Tang and Binh Tran where Gessner discussed the potential purchase of aircraft from Vietnam. On the 14th of December Gessner received a fax from co-defendant DeBrophy the subject of which was the sale of Vietnamese rice, followed by another discussion between Gessner and Tang on December 19, 1989.

On January 4, 1990 Appellant **TOOKER** first makes his appearance in the investigation by meeting with Khanh, Tang and Agent Gessner. At this meeting the commission that **TOOKER** and Tang would receive in the sale and the particulars of who actually would go to Vietnam to consummate the sale were generally discussed. It was at this very first meeting that Appellant **TOOKER** clearly

voiced his intention to not violate the law, (10 R. 105-115) This attitude never changed in subsequent negotiations and conversations.

Subsequently, the three met again on January 24, 1990 to consummate their sales agreement reducing it to writing. Appellant TOOKER again expressed the desire to maintain legality despite Gessner's questioning of the legality of the sale, his suggestion that TOOKER try to cheat the IRS, and his position that TOOKER should be involved in the purchase of M-16 rifles (10 R. 189-196).

On January 25, 1990 the three met again and TOOKER voiced his concern that Gessner was a Government agent who was trying to lead them into an illegal activity,

expressing his confusion about the state of the law and adhering to his desire not to break the law. (10 R. 232-233, 267-268).

On February 23, 1990 **TOOKER** attended a meeting with co-defendants DeBrophy, Scott, Tang, and Agent Gessner. Agent Gessner wanted to get to know all the individuals involved in the sale. (14 R. 132). **TOOKER** repeatedly voiced his position that he did not intend to do anything that violated the law. All present voiced the impression that the trade sanctions with Vietnam would soon be lifted. Gessner waffled on whether he wants Vietnamese or Basmati rice and at the conclusion he told all that he would get back in touch with them and let them know whether he wanted Vietnamese rice. (14 R. 143).

On April 13 "in an attempt to reinitiate our contract and set up the last meeting." Gessner called **TOOKER** on the phone. (11 R. 4, 93). In a general discussion of the legality of dealing with Vietnam, **TOOKER** announced again that he was ignorant of the law concerning trade with Vietnamese. (11 R. 97)

And, in a subsequent phone conversation on April 17, 1990 **TOOKER** basically said it didn't matter what sanctions there might be, he expected them to be lifted very shortly. (11 R. 122-123). He also alluded in this conversation to an attempt to determine what the law specifically was in regard to this sale by contacting an attorney (11 R. 123-126) and made it clear that he intended to

do nothing in furtherance of the sale until sanctions were dropped. (11 R. 127-129)

At trial Appellant TOOKER testified that he had attempted in January and February of 1990 to find out the status of the law through an attorney. The international attorney, however, was not aware of the TWEA and it wasn't until April of 1990, just before his arrest, that he learned the details of the Act. (16 R. 35-36) He testified that he did not intend to act on the sale until the sanctions were lifted in any case. (16 R. 37).

REASONS FOR GRANTING THE WRIT

1. THE GOVERNMENT CANNOT ESTABLISH A WILLFUL VIOLATION OF THE TWEA ON THE BASIS OF THE FACT THAT THE REGULATIONS WERE

PUBLISHED AND AVAILABLE. ACCORDINGLY, THE EVIDENCE IS INSUFFICIENT TO SUSTAIN THE PETITIONER'S CONVICTION FOR CONSPIRACY TO VIOLATE THE TWEA.

2. BY NOT REQUIRING THE GOVERNMENT TO PROVE THAT THE PETITIONER HAD ACTUAL KNOWLEDGE OF THE SPECIFIC REGULATIONS AND DELIBERATELY VIOLATED THE TWEA, THE OPINION BELOW CONFLICTS WITH THE HOLDING OF THE ELEVENTH CIRCUIT IN UNITED STATES V. FRADE, 709 F.2D 1387 (11TH CIR. 1984) WHICH REQUIRED ACTUAL KNOWLEDGE OF THE SPECIFIC REGULATIONS AS WELL AS A DELIBERATE VIOLATION OF THE TWEA TO SUSTAIN A CONVICTION.

ARGUMENT AND AUTHORITIES

I. There is insufficient evidence to sustain the Petitioner's conviction for violating the TWEA.

In re Winship, 397 U.S. 358 (1970) firmly established the principal that the due process clause of the fifth amendment to the United States Constitution requires proof of each element of the offense beyond a reasonable doubt. While Petitioner certainly recognizes that factual disputes are typically left to the fact finder, the appropriate standard of appellate review still requires that an appellate court may sustain a criminal conviction only if, viewing the evidence in the light most favorable to the government, "any rational trier of fact could have found the essential

elements of the crime beyond a reasonable doubt." Glasser v. United States, 315 U.S. 60, 80 (1942); Jackson v. Virginia, 443 U.S. 307, 319 (1979)

The Fifth Circuit affirmed the conviction of **TOOKER** on the basis that there was sufficient evidence to show that he willfully violated the administrative regulations. The Fifth Circuit so found despite the fact that there was absolutely no evidence to indicate that the Petitioner had any actual knowledge of the administrative provisions at issue or deliberately violated them.

The opinion below noted that a violation of the TWEA must be "willful," United States v. Tooker, 957 F.2d 1209, 1213-1214, (5th Cir. 1992); however, the Court below did not

require that the petitioner has knowledge of the specific regulations governing transactions with Vietnamese nationals. THe government only had to show that "the defendants knew that their planned conduct was legally prohibited and that they therefore acted with an "evil meaning mind." Id. at 1214.

This holding is in direct conflict with recognized precedent which requires proof in cases involving alleged violations of administrative regulations of the defendant's actual knowledge that his conduct was illegal. In Cheek v. United States, 111 S.Ct. 605, 611 (1991), this Court held that in specific intent offenses, willfulness "requires the Government to prove that the law imposed a duty on the

defendant, that the defendant knew of his duty, and that he voluntarily and intentionally violated that duty." See generally United States v. Adames, 878 F.2d 1374, 1377 (11th Cir. 1989); United States v. Davis, 583 F.3d 190, 193 (5th Cir. 1978); United States v. Granda, 565 F.2d 922, 924 (5th Cir. 1978); United States v. Schnaiderman, 568 F.2d 1208, 1211 (5th Cir. 1978) which all stand for the general proposition that the finding that a defendant is aware that his conduct is generally unlawful is insufficient to sustain a finding of guilt under a statute requiring specific intent.

TOOKER was engaged in transactions which are not normally considered illegal. Under

such circumstances, the government was required to prove actual knowledge that the conduct is illegal. The mere publication of administrative regulations does not establish a defendant's knowing and willful violation of the law. A review of the record herein reveals that the undercover agent did not provide sufficient knowledge that the proposed transactions were illegal.

While it is true that Gessner made several comments about the mechanics of the Act to **TOOKER**, the content of the statements and context in which the statements were made reveal that Gessner's vague and oblique references to the Act are insufficient to impute knowledge of the provisions to **TOOKER**.

SUMMARY OF ARGUMENT

The evidence adduced at trial was insufficient to sustain a conviction under the Trading with the Enemy Act (TWEA) as to Defendant-Appellant **TOOKER.** The TWEA is a specific intent crime so that the Government bore the burden at trial of proving the Appellant knew the specific provisions of the TWEA and with this knowledge, deliberately violated the Act. The record in this case is devoid of proof that Appellant **TOOKER** had any knowledge of the specific provisions of the Act or that he set out to deliberately violate the TWEA.

The Record reveals that the undercover agent assigned by the Government to make sure that the Appellant was on notice of the specific provisions of the TWEA was himself

unaware of the specifics of the Act. Predictably then, his references in connection with Appellant, to the Act were confused, misleading, and totally without assertion of accuracy or authority. The Government, then fell far short of imparting knowledge of the Act to Appellant as a requisite to establishing the scienter necessary to establish a violation of the TWEA.

Simply raising the question of the legality of certain acts associated with trading with Vietnam, and not purporting to have sufficient knowledge to know specifically what the prohibitions are, as the Government did through their agent here, provided no more in the mind of Appellant

than a general concern that what he was doing might be proscribed by law.

Specific intent to violate the TWEA, a specific intent crime, cannot be established on the basis of this generalized concern about legality.

The absence in the record of proof that Appellant had actual knowledge of the regulatory provisions of the TWEA points out the central defect in the Government's case. The TWEA was drawn to prosecute people who know unequivocally what the law is and who, then, set out to violate it. Instead of having the agent sit down with Appellant and say "I've been talking to my lawyer and he xeroxed a copy of the Act and here it is - what we are doing is illegal and I'm going to do it anyway, do you want to do it with

me", the Government deals in vagaries. The reason for this is clear in the record; Appellant (and his co-defendants) would have readily refused and that would have been the end of the investigation with no resulting prosecution.

The uninformed violator is not the focus of the TWEA. Being uninformed as to the specific provisions of the Act, Appellant, and his co-defendants were not the contemplated focus of the Act. The record illustrates that if they had been so informed, they would have abandoned their plan. The Government injected only enough innuendo to present an arguable case to the jury, but not enough knowledge to make Appellant abandon the scheme. The result is the conviction of a defendant who lacked

the specific intent to sustain a conviction under the TWEA.

The Government also failed to prove that Appellant deliberately violated the TWEA. The record clearly reveals that Appellant had no intent to violate any law, and in particular the TWEA. Also, the record is replete with assertions on the part of Appellant that he did not intend to trade with Vietnam until the sanctions against such trade were lifted. There is no evidence in the record that Defendant deliberately violated the TWEA. The evidence was insufficient, then, that Appellant had the knowledge requisite to scienter or that he deliberately violated the TWEA. A reasonable trier of fact could not have so concluded.

In light of such facts, the government failed to prove beyond a reasonable doubt that **TOOKER** knew that engaging in transactions with Vietnam or Vietnamese national was illegal and that they intended to violate the law. Accordingly, **TOOKER** convictions should have been reversed and judgment of acquittal entered in their favor.

II. The opinion below conflicts with the holding of the Eleventh Circuit in Frade v. United States, 709 F.2d 1387 (11th Cir. 1983).

Although the Court below discussed the application of Frade extensively in its treatment of Mr. Tran's sufficiency claim, the Fifth Circuit never addressed the two prongs required by the Frade Court to

sustain a conviction. Under the TWEA's regulatory provisions, the government must satisfy two prongs in order to meet its burden of proof.

First, it must be shown that the defendants actually knew the regulatory provisions at issue. Second, it must be sown that the defendants deliberately violated the TWEA. These dual prongs were discussed extensively by the Frade Court which opined:

> To be criminal, violations of regulations promulgated pursuant to the TWEA must be willful. McGrath v. Manufacturer's Trust Co., 338 U.S. 241, 247, 249, 70 S.Ct. 4,7,8,94 L.Ed.2d 31 (1949). 50 U.S.C., Appendix section 16 (Supp. 1983), which defines the punishment for violations of the TWEA, states in pertinent part:
>
> > Whoever shall willfully violate any of the provisions of the Act...or of any...rule, or regulation issued thereunder...or

> refuse to comply with any order of the President issued in compliance with the provisions of this Act shall, upon conviction, be fined not more than $50,000 or, if a natural person, imprisoned for not more than ten years, or both.' [footnote omitted'

[parenthetical omitted]

When used in a criminal statute, "the word 'willfully'...generally connotes a voluntary, intentional violation of a known legal duty." United States v. Bishop, 412 U.S. 346, 350, 93 S.Ct. 2008, 2017, 36 L.Ed.2d 941 (1973). Accord, United States v. Hernandez, 662 F.2d 289, 292 (5th Cir. 1981); United States v. Davis, 583 F.2d 190, 193 (5th Cir. 1978)..."

In such circumstances, crimina willfulness requires more than the ordinary legal assumption that the person charged know what he is doing and act deliberately. A finding of specific intent is essential. United States v. Davis, 583 F.2d at 193; United States v. Schnairderman, 568 F.2d 1208, 1211 (5th Cir. 1978); United States v. Granda, 565 F.2d 922,926) (5th Cir. 1978). Because the activities denoted unlawful "are spelled out in administrative

> regulations and include items not known generally to be controlled by the government," United States v. Davis, 583 F.2d at 193, the regulatory provisions must be "actually known and intentionally violated" for a crime to be committed. United States v. Warren, 612 F.2d 887, 890, (5th Cir.) (en banc) cert. denied, 446 u.S. 956, 100 S.Ct. 2928, 64 L.Ed.2d 815 (1980) (emphasis in original). Accord, United States v. Schnaiderman, 568 F.2d at 1211."

738 F.2d 1391-1392.

The Government's failure to prove the first prong is reflected above in the arguments; the Frade Court also required that government show that TOOKER deliberately intended to violate the TWEA. The Fifth Circuit's opinion never addressed this point which was in effect the second barrel of TOOKER's attacks on the sufficiency of the evidence.

Because the Fifth Circuit has in effect set out a different standard or review,

indeed, a standard of review which allows a conviction on less evidence required by the Eleventh Circuit in similar proceedings, the conflict in the Circuits must be resolved and this Court should grant this petition.

CONCLUSION

For these reasons, the Petitioner respectfully prays that the Application for Writ of Certiorari be granted by this Court.

Date: _____

Respectfully submitted,

_____

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APPENDIX A

**UNITED STATES of America,
Plaintiff-Appellee,**

v.

**Guy Willard TOOKER, Bao, Tran, Roy John Scott and Robert C. DeBrophy,
Defendants-Appellants.**

**No. 91-2148
United States Court of Appeals
Fifth Circuit**

March 30, 1992

Defendants were convicted of conspiracy to purchase rice from Vietnamese nationals in violation of Trading With the Enemy Act by the United States District Court for the Southern District of Texas, Sim Lake, J. Defendants appealed. The Court of Appeals, Patrick E. Higginbotham, Circuit Judge, held that: (1) evidence that three defendants structured transaction to conceal its illegality supported jury finding of specific intent to violate Act, and (2)

circumstantial evidence concerning fourth defendant's long experience with Vietnamese trade and awareness of "barriers" supported jury finding of willful violation of Act.

Affirmed.

1. **Criminal Law 1144.13(3,5), 1159.2(7)**

Court of Appeals must affirm convictions if reasonable trier of fact could conclude from evidence produced at trial that elements of offense were established beyond a reasonable doubt, viewing all evidence in light most favorable to jury's verdict and drawing all reasonable inferences from evidence to support that evidence.

2. **Criminal Law 1159.2(8)**

Evidence need not exclude every reasonable hypothesis of innocence for Court of Appeals to affirm jury's guilty verdict.

3. **War and National Emergency** 507

Under Trading With the Enemy Act, license from Office of Foreign Assets Control is required to engage in prohibited transactions with designated country. Trading With the Enemy Act §5(b)(1)(B), 50 App.U.S.C.A. §5(b)(1)(B).

4. **War and National Emergency 514**

Willful violation of Trading With the Enemy Act is essential element of any conviction under Act. Trading With the Enemy Act, §16, 50 App.U.S.C.A., §16.

5. **War and National Emergency 514**

Mens rea for conviction under Trading With the Enemy Act requires proof that defendant had knowledge of restrictions, acted with specific intent to circumvent those requirements, and acted with "evil meaning mind"; proof that defendant negligently failed to investigate

regulations is not sufficient. Trading With the Enemy Act, §16, 50 App. U.S.C.A., §16.

6. **War and National Emergency 514**

Circumstantial proof of specific intent may suffice to show mens rea needed for conviction under Trading With the Enemy Act, §16, 50 App. U.S.C.A., §16.

7. **War and National Emergency 514**

Jury's finding that defendant willfully violated Trading with the Enemy Act by conspiring to purchase rice from Vietnamese nationals was supported by evidence that defendant was repeatedly warned that transaction was illegal but responded with ways to conceal illegality and defendant reassured undercover informer not to worry about Act. Trading With the Enemy Act, §§ 1 et seq., 16, 50 App.U.S.C.A., § 1 et seq., 16.

8. **War and National Emergency 514**

Jury finding that two defendants intended to arrange sale of rice from Vietnamese nationals, knowing that sale violated Trading With the Enemy Act, was supported by evidence that defendants structured transaction to conceal its illegality and defendants were planning sale of immense quantity of rice from Vietnamese source. Trading With the Enemy Act, §§ 1 et seq., 16, 50 App. U.S.C.A., §§ 1 et seq., 16.

9. **War and National Emergency 514**

Jury finding that defendant willfully disregarded Trading With the Enemy Act by going forward with sale of rice from Vietnamese nationals was supported by circumstantial evidence that price of Vietnamese rice was below world market price, that defendant had long experience with Vietnamese trade, that defendant was aware that trade with Vietnam was subject to

trade barriers, and that regulations prohibiting purchase of rice from Vietnamese nationals were published and available for inspection. Trading With the Enemy Act., §§ 1 et seq., 16, 50 App. U.S.C.A., §§ 1 et seq., 16.

Robert J. Fickman (Court-appointed), Schaffer, Lambright, Odom, & Sparks, Houston, Tex., for Scott.

David P. Cunningham, Houston, Tex. (Court-appointed), for DeBrophy.

Don Ervin, Houston, Tex., for Tooker.

Marjorie A. Meyers, Att., Houston, Tex. (Court-appointed), for Tran.

Mervyn Hamburg, Att., Appellate Section, Crim. Div., U.S. Dept. of Justice, Washington, D.C., Paula C. Offenhauser, Ronald G. Woods, U.S. Atty., Houston, Tex., for the U.S.

Appeal from the United States District Court for the Southern District of Texas.

Before REAVLEY, HIGGINBOTHAM, and DeMOSS, Circuit Judges.

PATRICK E. HIGGINBOTHAM, Circuit Judge:

Guy Tooker, John Scott, Bao Tran, and Robert DeBrophy appeal convictions for conspiracy to violate the Trading With the Enemy Act, contending that there was insufficient evidence. We affirm.

I.

This case arises out of the Customs Service's investigation of an alleged conspiracy of appellants and others to purchase rice from Vietnamese nationals in violation of the Trading With the Enemy Act, 18 U.S.C. §371, and implementing federal regulations. Bao Tran, Khanh Cong Tang, Binh Vinh Tran, Tooker, DeBrophy, and Scott, were charged in a two-count indictment with

conspiring to violate the TWEA and its substantive violation. All the defendants moved for and receiving a judgment of acquittal on the substantive count at the end of the government's case in chief.

During deliberation, at the jury's request, the judge gave additional instruction on the relevance of ignorance of the law to the verdict. The jury reached a partial verdict as to Tang, DeBrophy, Scott, and Tooker. The jury then requested further instruction on the definition of "willful" action under TWEA. The court again instructed the jury that the defendant "must know what the law forbids" in order to have the intent necessary for the conviction under TWEA. Following this instruction, the jury convicted Tran. The jury acquitted Binh Vinh Tran on all counts.

Tran was sentenced to 90 days followed by two years of supervised release. Tooker received one year in prison, two years of supervised release, and a $100,000.00 fine. Scott and DeBrophy each received three years probation.

II.

Bao Tran and Khanh Cong Tang ran a trading company called Intercontinental Trading. The Customs Service began an undercover investigation of Intercontinental Trading in October, 1989. As part of this investigation, the Customs Service set up an office purporting to be a commodity trading company called "Charter Trading" and assigned an agent, Greg Gessner, to hold himself out as Charter Trading's "representative." Through an informant, Charter Trading began negotiations with

Intercontinental Trading, purportedly for purchasing products from Vietnam.

This investigation produced 24 tape-recorded or videotaped interviews between the agent and defendants from a five-month period between December 11, 1989, and April 20, 1990. The first recorded conversation was on December 11, 1989, when Gessner first telephoned Intercontinental Trading and the last on April 17, 1990. Gessner and Tang met on December 13, 1989, to discuss Gessner's proposed transaction in more detail. Tang proposed to sell rice to Gessner through a company run by Debrophy called "MEAMCO." Gessner expressed interest in this transaction. On December 14, DeBrophy sent Gessner a memorandum, describing Vietnamese rice and proposing to ship such rice to Gessner beginning in December, 1989. DeBrophy stated in the

memorandum that "our man is in Saigon" to arrange the transaction. At a later telephone interview, when Gessner asked whether the country of the rice's origin would be reflected on the shipments, DeBrophy explained that the Vietnamese rice was mixed with Thai rice and was shipped to the United States as "Thai rice."

On January 4, 1990, Gessner met at Charter Trading's "office" with Tang and with Tooker, the owner of Bob's Pawn Shop. Tooker was described as the "financier" of the transaction. Tooker stated that he would not got to Vietnam because he believed that "it was against the law for an American to go to Vietnam." In response, Gessner stated:

> To be technically accurate here, I think that it's against federal law to...be negotiating this kind of deal. That's why I want to be very careful about this.

Later in the meeting, Tooker stated that Gessner could pay for the goods with gold, and gold could be sent to and sold in Hong Kong, so that the "gold would not have to go to Vietnam."

Gessner telephoned Tooker on January 18. Tooker then complained that he had not yet turned a profit on the deal, despite his investment of $65,000.00.

Gessner met again with Tang and Tooker at Charter Trading on January 24. Gessner expressed for a second time the danger of being detected while dealing with the government of Vietnam. Tooker stated that they were "protected" because they were not actually selling anything by rather were simply middlemen arranging a sale. Moreover, he stated that they were not dealing with the government of Vietnam,

because all the planes "have been going to Hong Kong." Tang again reassured Gessner that his visit to Vietnam would not show upon on his passport. At the close of the meeting, Tooker warned the other participants not to discuss the transaction around strangers.

Tang, Tooker, and Gessner met for a third time on January 25. At this meeting, Tooker asked Gessner if he was actually working for the C.I.A. When Gessner replied that he was not an undercover agent and was not trying to "set them up", Tang stated that, even if Gessner was working with the C.I.A., Tang was "glad to deal with [him]."

Gessner began negotiations with Tran on January 26 by telephoning him in Vietnam where he remained until March 13. Gessner faxed Tran a list of questions to which he responded in writing by stating that the

transactions would involve high Vietnamese government officials and that Gessner need not get his passport stamped when visiting Vietnam.

During telephone conversations with Gessner in February, Tooker and DeBrophy discussed arrangements to prevent Gessner from having contact with Vietnam. Tooker stated that Gessner would not be going to Vietnam, but rather to Thailand. Gessner replied that he understood Tooker's statement to mean that "I won't show anything else on my passport." DeBrophy also stated that "If the U.S. government don't [sic] like...Royal Columbia doing any business with the Vietnamese, we can get Royal Columbia registered in Columbia to do business. No problem." Royal Columbia was the name of a business with which DeBrophy and Scott were affiliated.

Soon after these conversations, Gessner received a letter of intent from DeBrophy that referred to the purchase of "Basmati rice." The letter was signed by DeBrophy and Scott, DeBrophy's partner. On February 23, Gessner met with Scott, DeBrophy, and Tooker at DeBrophy's office to discuss the proposed contract. This is the only meeting at which Scott and Gessner were both present. During this meeting, Gessner mentioned the TWEA by name for the first time, stating that "technically we are in violation of [TWEA]" simply by negotiating the transaction.

In response, the three defendants present stated that they believed that U.S. relations with Vietnam would soon be normalized such that it would soon be legal to transact business with Vietnam nationals. All three expressed some reluctance to go

forward with the transaction until relations with Vietnam were "normalized." Scott expressed his desire to wait until business with Vietnam was "legitimate." DeBrophy stated that he would not sell rice until normalization, because he did not wish to get involved in "sub rosa stuff." Tooker stated that "he would not want to do anything if I though I'd get in trouble."

However, in contrast with these statements, the defendants also expressed a desire to conceal their transaction and go forward with it, despite their knowledge of its illegality. Tooker recommended that the rice be described as "Southeast Asia rice," because "it is against the law in this country to do business with Vietnam, so we don't need to say Vietnamese rice." DeBrophy stated that until relations are normalized, "We still have to pretend."

Scott reassuringly advised that "unless someone disturbs the State Department, no one is likely to get into trouble." Tooker reiterated this sentiment when he told Gessner that "my name and your name would never appear together" on the documents evidencing the transaction.

On March 13, Tran returned to the United States from Vietnam, via Thailand. He carried a twenty-pound sack of rice on his person that he did not declare to customs. Tran admitted that the rice came from Vietnam when Customs officials discovered it in his suitcase.

On April 13, Gessner telephoned Tooker at his pawn shop. Tooker told Gessner that he did not wish to do anything illegal and that he did not "know that much about the law." On April 17, Tooker repeated his wish not to do "anything wrong." He also stated that he

would retain an attorney familiar with international law to explain the TWEA, and he expressed his belief that the transaction "may be legal in May" after the allegedly pending normalization of relations with Vietnam. Tooker ended by stating that they should "set up the transaction" subject to the dropping of the sanctions." Gessner later called Tang at the offices of a company called "Mountain Aroma." When Gessner asked Tang whether he wanted to delay the transaction until normalization, Tang stated, "I don't think so...."

On April 20, the defendants were arrested, and the Customs Service searched the premises of Royal Columbia, Mountain Aroma, and Tooker's Pawn Shop. These searches turned up letters or faxes discussing the price of Vietnamese rice and various sales of such rice to firms and

countries. Three of the letters discussed the sale of Vietnamese rice to Libya. The search also turned up a letter from Tran to Tang advising that they purchase Vietnamese rice from Vietnamese government and a contract between Scott, DeBrophy, and a Canadian firm for the purchase of Vietnamese rice and sale of the rice to Libya. The search revealed a contract between Intercontinental Trading (entered into by Tran on October 25, 1989) and a Vietnamese company, Tedico Vina Dong Thap, for the shipment of 850,000 metric tons of Vietnamese rice commencing on December 1989.

At trial, only Tooker and Tran's wife testified. Tooker stated that he intended to do business with Vietnam only after sanctions were lifted. He claimed to be unaware of the need to obtain a license in order to do business with Vietnam. Tran's

wife stated that her husband went to Vietnam to assist his parents in coming to the U.S.

III.

[1,2] We must affirm if a reasonable trier of fact could conclude from the evidence produced at trial that the elements of the offense were established beyond a reasonable doubt, viewing all evidence in the light most favorable to the jury's verdict and drawing all reasonable inferences from the evidence to support that verdict. **Glasser v. United States**, 315 U.S. 60, 80, 62, S.Ct. 457, 469-70, 96 L.Ed. 680 (1942); **United States v. Prieto-Tejas**, 779 F.2d 1090, 1101 (5th Cir. 1986). Moreover, the evidence need not exclude every reasonable hypothesis of innocence for his court to affirm the jury's verdict. **United States v. Juarez-Fierro**, 935 F.2d 672, 677

(5th Cir. 1991); **United States v. Ayala**, 887 F.2d 62, 67 (5th Cir. 1989).

[3] The regulations of the Office of Foreign Assets Control. promulgated pursuant to TWEA, 50 U.S.C. App. § 5(b)(1)(B),[1] prohibit, except as specifically authorized by the Secretary of the Treasury, "[a]ll dealings in, including, without limitation, transfers, withdrawals, or exportations of, any property or evidences of indebtedness or evidences of ownership of property by any person subject to the jurisdiction of the

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[1] 50 U.S.C. App., §5(n)(1)(B) provides that "During times of war, the President may...prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation, or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving any property with respect to which any foreign country or a national thereof has any interest, by any person, or with respect to any property subject to the jurisdiction of the United States...."

United States" if such transactions "involve property in which any designated foreign county, or any national thereof, has...had any interest of any nature whatsoever, direct or indirect." 31 C.F.R. § 500.201(b)(1). A license from the Office of Foreign Assets Control is required to engage in the prohibited transactions with a designated county. Vietnam is a designated country.

[4] TWEA also provides severe criminal penalties for "[w]hoever shall willfully violate [regulations promulgated pursuant to TWEA]." 50 U.S.C.App. § 16 (West 1990) (emphasis added). Willful violation of TWEA is an essential element of any conviction under the Act. **United States v. Frade**, 709 F.2d 1387, 1391 (11th Cir. 1983). The government must prove "at least the degree of criminal intent necessary for the

substantive offense." **United States v. Davis**, 583 F.2d 190, 192 (5th Cir. 1978).

We have not addressed the mental state required for a conviction under the TWEA. We have interpreted similar statues and read them to require proof that a defendant had specific intent. See, eg., **United States v. Warren**, 612 F.2d 887, 890 (5th Cir. 1980), (en banc) (31 U.S.C. §§ 1058, 1101 (a)(10(A), currency reporting statute); **United States v. Davis**, 583 F.2d 190, 194 (22 U.S.C. §1934(c), munitions export statue); **United States v. Schnaiderman**, 568 F.2d 1208 (5th Cir. 1978) (currency reporting statute); **United States v. Granda**, 565 F.2d 922 924 (5th Cir. 1978) (same).

[5] The government must prove that appellants "had knowledge of [the restrictions] and acted with the specific intent to circumvent those requirements."

Granda, 565 F.2d at 924. See also **United States v. Frade**, 709 F.2d 1387, 1392 (11th Cir. 1983) Violation of TWEA requires that "the defendants are apprised of both the necessity for obtaining, and the possibility of obtaining, such a license") Proof that the defendant negligently failed to investigate the regulations does not sufficiently prove requisite mens rea. **United States v. Adames**, 878 F.2d 1374, 1376 (11th Cir. 1989) (per curiam).

The government, however, need not show that appellants had knowledge of the specific regulations governing transactions with Vietnamese nationals. **Liparota v. United States**, 471 U.S. 419, 434, 105 S.Ct. 2084, 2092, 85 L.Ed.2d 434 (1985) (discussing proof of specific intent to commit food stamp fraud). The appellants cannot "avoid prosecution by claiming that

[they] had not brushed upon on the law." **Hamling v. United States**, 418 U.S. 87, 123, 94 S.Ct. 2887, 2911, 41 L.Ed.2d 590 (1974). Rather, the government must prove only that the defendants knew that their planned conduct was legally prohibited and that they therefore acted with an "evil-meaning mind." **Morissette v. United States**, 342 U.S. 246, 251, 72 S.Ct. 240, 243-44, 96 L.Ed. 288 (1952).

[6] Moreover, the government is not confined to a direct proof of the requisite mens rea. Circumstantial proof of specific intent may suffice. **Liparota**, 471 U.S. at 434, 105 S.Ct. at 2092; **United States v. O'Banion**, 943 F.2d 1422, 1429 (5th Cir. 1991) (specific intent to violate currency reporting law.) The jury may infer willful violations of a known legal obligation from "facts and circumstances surrounding the

case." **Liparota**, 471 U.S. at 434, 105 S.Ct. at 2092.

With these principles in mind, we have little difficulty in finding the evidence sufficient to show that Tooker, Scott, and DeBrophy acted with specific intent to violate regulations prohibiting unlicensed transactions with Vietnamese nationals.

A. Evidence Showing Tooker's Specific Intent

[7] The jury could have concluded that Tooker repeatedly warned that the transaction was illegal but responded with ways to conceal the illegality. For instance, Gessner warned Tooker that the transaction was against federal law on January 4, 1990, stating that "I think that it's against federal law to...be negotiating this kind of deal." Tooker did not respond to this remark. Later at the same January 4 meeting, however, Tooker stated that

Gessner could pay for the goods in question by using gold sold in Hong Kong, so that the "gold would not have to go to Vietnam." At the same January 24 meeting, Gessner asked Tang and Tooker whether he could avoid having his passport stamped "because of the, the federal laws that are being, uh, circumvented." Neither Tooker nor Tang contradicted this characterization of the transaction. Instead, Tang reassured Gessner that this passport would not have to be stamped. Tooker ended the January 24 meeting by stating to Tang and Gessner, "[y]ou and I don't talk about it, unless we're out in the open somewhere, where nobody around [sic]. The less contact, and, uh, uh...if you come out to the store, if you want to tell me something, you go outside."

Finally, a jury could infer the necessary culpability from Tooker's remarks on February 23. At this meeting, Gessner recalled a discussion with Tooker in which "we talked about this Trading with the Enemy Act" and stated that he was "a little concerned about it." Tooker reassured Gessner by noting that "on this rice, the way-the only way I know to work now is through, uh, Canada." Gessner asked whether "we could make it appear that everything is actual paperwork actually...went through the Canadian end of it and really insulate ourselves." Tooker replied, "right, right." He further noted that "your name and my name would never appear anywhere" and that 'there's no...just cash." Finally, in responding to a discussion about the different types of rice, Tooker stated that "my ultimate point is it's against the law

in this country to do business with, uh, Vietnam, so we don't need to say Vietnamese rice." He further explained the he even told his wife that the rice came from Thailand.

A reasonable juror could infer from these conversations that Tooker knew the proposed deal was illegal and wanted to hide it to evade the law. Tooker makes much of the fact that he occasionally expressed scruples about violating real or imagined prohibitions on transactions concerning Vietnam. Tooker refused to sell weapons to Gessner, he also refused to visit Vietnam, stating erroneously that such a visit was illegal. Tooker also stated that "as far as I'm concerned we're not [dealing with Vietnam]" because "these planes have been going to Hong Kong or something." Finally, on April 13, Tooker told Gessner over the

telephone that he did not want to do "anything wrong" and that the parties should "set up the transaction subject to the dropping of the sanctions."

However, Tooker did not state that he wanted to delay the transaction until April 13--several months after he had become involved in the negotiations. Before April, Tooker repeatedly indicated that he planned to go forward with the transaction by using deception to avoid prosecution under the law. The jury could have inferred from Tooker's sudden reluctance to do business that Tooker had become suspicious of Gessner and was attempting to protect himself from a potential informer.

Tooker's expressions of scruples before April 13 do not prevent a jury from finding that Tooker knew that the planned transaction was illegal. Tooker could be

willing to violate the TWEA by sales of rice but be unwilling to sell narcotics and weapons. Tooker's statement that "I-I-I wouldn't do anything if I though I'd get in trouble" does not bar the jury from finding that Tooker intended to violate the law: the jury could have inferred that Tooker was only expressing a fear of being caught.

Finally, the jury could convict Tooker despite Gessner's failure, in Tooker's words, to "sit down with [Tooker] with a xerox copy of the [TWEA]" to explain the illegality of the proposed transaction. Contrary to Tooker's brief on appeal, the government need not read chapter and verse of the TWEA to Tooker to test his knowledge of the illegality, as long as the "facts and circumstances surrounding the case" indicate that Tooker was willfully violating the TWEA. Liparota, 105 S.Ct. at 2092. The

evidence at trial provided ample grounds for the jury's inference that Tooker committed such a willful violation.

B. Evidence Showing Scott's and DeBrophy's Specific Intent.

[8] A reasonable juror could also conclude that Scott and DeBrophy intended to violate TWEA. As with Tooker, DeBrophy's statements support an inference that he was structuring the transaction to conceal its illegality. On February 22, when Gessner expressed uneasiness "about the fact that the, the origin on this is Vietnam," DeBrophy replied that this was "no problem," and DeBrophy later explained that "if the U.S. government don't like, uh, uh, Royal Columbia [registered in the United States] doing any business with the Vietnamese, we can get Royal Columbia registered in Columbia to do business."

At the meeting of February 23, when Tooker stated that "it is against the law in this country to do business with Vietnam," DeBrophy stated that "until relations are normalized, we still have to pretend." Scott likewise stated that "unless someone disturbs the State Department, no one is likely to get into trouble." These statements indicate that DeBrophy and Scott intended to use deception to go forward with the transaction, despite their professions that they would not sell rice until normalization.

Finally, we note that evidence suggested that Scott and DeBrophy were planning the sale of an immense quantity of rice from a Vietnamese source. The evidence also suggested that both Scott and DeBrophy were well aware that Vietnamese rice was cheaper than "Basmati" rice, despite the fact that

the different types of rice were essentially identical in quality. A reasonable jury could infer that both Scott and DeBrophy could not help but realize that Vietnamese rice's price because of economic sanctions against Vietnam preventing the normal sale of Vietnamese rice on the world market.

Both DeBrophy and Scott contend that, because their letter of intent to Gessner described an agreement to sell Gessner "Basmati rice," there is no evidence that either intended to sell Vietnamese rice in violation of the law. However, there was ample evidence that both DeBrophy and Scott were willing to sell Vietnamese as well as Basmati rice to Gessner. A reasonable juror could have inferred that Scott and DeBrophy intended to arrange the sale of rice from Vietnamese nationals or the Vietnamese

government, knowing that such a transaction violated U.S. law.

C. Evidence Showing Bao Tran's Specific Intent.

The evidence concerning Bao Tran presents a closer question. Tran was in Vietnam during most of the period of the alleged conspiracy. Therefore, he was not present at any of the tape-recorded conversations during which Gessner and Tooker stated that the proposed transaction was illegal.

[9] However, we find sufficient circumstantial evidence to support Bao Tran's conviction. The jury could have inferred from Bao Tran's surreptitious behavior, his extensive experience with Vietnamese trade, and the statement in a letter from Tran that he faced difficulty because of a "trade barrier" that Tran willfully disregarded regulations

promulgated under TWEA in going forward with the rice transaction.

The jury could have inferred that Bao Tran as aware of the regulations prohibiting transactions involving property of Vietnam nationals from the sheer scale of Tran's involvement with the Vietnamese trade and the circumstances surrounding that trade. Bao Tran was an not occasional participant in trade deals involving Vietnam. His firm Intercontinental Trading arranged large sales of Vietramese rice throughout the world. The contract with Tedico Vina Dong Thap, for instance, involved the sale of 850,000 metric tons of Vietnamese rice to Intercontinental Trading. In other documents introduced by the government at trial, DeBrophy proposes the sale of Vietnamese rice to Peru, Libya, Nigeria, Spain, and Mexico in quantities ranging from

40,000 to 120,000 metric tons. Tang, Tran's partner, proposed sales of over 100,000 metric tons of rice to Gessner.

The government introduced evidence that Vietnamese rice was less expensive than other rice, despite the similarity of Vietnamese rice in quality to other sorts of rice. Both Scott and DeBrophy told Gessner that the price of Vietnamese rice was lower than rice from other source countries, despite their substantially identical quality. The jury could infer that Tran must have known that Vietnamese rice was cheaper in part because of the restrictions on its sale in the United States. It was reasonable to infer from Tran having arranged these sales that he knew why they were profitable--the prohibition on trade with Vietnam imposed by the United States. The jury could

conclude that Tran not only know of the sanctions imposed by the United States against transactions involving Vietnam, but also was knowingly exploiting a market created by the United States' sanctions.

This inference is made more reasonable by the evidence introduced at trial that Tran had an exclusive arrangement to purchase rise from the Vietnamese government. According to a fax from DeBrophy to a potential buyer of Vietnamese rice, "our man will be in Saigon next week and we have an exclusive on this price." The jury could reasonably have concluded that sellers of rice do not give exclusive rights to buyers so inexperienced in Vietnamese trade that they do not realize that the United States prohibits transactions involving the property of Vietnamese nationals.

There was evidence that Bao Tran knew that Vietnamese trade was regulated by the United States. A document found on Bao Tran's word processor stated in Vietnamese that "Due to facing difficulty [sic] problems because of prohibition, I'm trying to resolve problems and it will be resolved in a few days." Bao Tran insists that the word "prohibition" ought to be translated as "trade barrier." However, this translation does little to support Tran's defense. The jury could infer from this document that Tran was speaking of the trade sanctions erected by the United States -- surely the most significant trade barriers with which Tran would have had to deal.

Finally, Tran's efforts to conceal the transaction indicate that he knew the transaction was illegal. When Gessner asked whether his entry into Vietnam could be

concealed on his passport, Tran replied that his passport need not show that he visited Vietnam. The jury could have inferred from Trans' complicity in concealing the links of the transaction with Vietnam that Tran knew that transactions involving Vietnam were illegal.

Tran relies heavily on the Eleventh Circuit's decision in **United States v. Frade**, 709 F.2d 1387, 1392 (11th Cir. 1983) to support his contention that the evidence is insufficient to support the inference that he knew that the transaction with Gessner was illegal. However, **Frade** is different.

In **Frade**, several priests arranged for a chartered boat to travel to Cuba to transport Cuban refugees from Cuba to the United States during the famous Mariel boat lift. They were convicted after this

expedition for violation of TWEA and 31 C.F.R. § 515.415(a), which prohibits transactions in connection to the transportation of any Cuban national lacking a visa to the United States. The Eleventh Circuit reversed the conviction of the priests on the ground that there was insufficient evidence to support a finding that they had specific intent to violate the statue or regulation.

The U.S. policy toward the evacuation of Cubans during the Mariel boatlift was in a state of flux when the priests organized their boatlift of Cubans. While President Carter had permitted 3,500 Cuban refugees encamped in t he Peruvian embassy to Cuba to enter the United States, President Carter also issued statements that "illegal" transportation of refugees would not be tolerated. The regulation that the priests

were convicted of violating was not enacted until two months after the priests began planning the boatlift. **Frade**, 709 F.2d at 1389, 1395-96.

The Eleventh Circuit found that the priests "made extensive efforts, up to the time of their voyage, to discover and keep abreast of government policy toward the refugees." **Frade**, 709 F.2d at 1394. These efforts included meetings with the offices of two Senators and three representatives. Congresswoman Lindy Boggs testified at the priests' trial that the priests sought information as to whether the proposed trip to and from Cuba complied with U.S. policy. Congresswoman Boggs also testified that she believed that the United States was "encouraging and welcoming" the proposed boatlift, based on President Carter's statement on May 5, 1980, that "we'll

continue to provide an open heart and open arms to refugees seeking freedom from Communist domination and economic deprivation...." **Frade**, 709 F.2d at 1394-95.

The priests also met with officials from the Justice Department, the INS, the White House (including the Press Secretary to President Carter, Jody Powell, and they asked the Senators and Congressman, with whom they met to "inform the President" of what they planned to do. Some of the officials with whom the priests met warned that the priests' boatlift might violate immigration laws, and some stated that, in light of President Carter's comments on May 14, 1980, the boatlift might be prohibited by U.S. policy. **Frade**, 709 F.2d at 1390.

However, the **Frade** court noted that the President's policy statement clearly warned

against only the transportation of Cuban immigrants in unsafe ships and transportation of "undesirables"--drug addicts, criminals, etc.--to the United States. Because the priests had taken special care to ensure that no undesirables would be on their ship and to guarantee that their ship was safe and seaworthy, the **Frade** court concluded that the priests were not put on notice that their proposed boatlift was illegal. **Frade**, 709 F.2d at 1396-97.

Crucial to the **Frade** court's holding was the fact that, when the priests planned the transportation of the Cubans to Florida, 31 C.F.R. Sec. 515.415, the regulation under which they had been convicted, was not enacted or promulgated. The regulation was not effective until May 15, 1980, two months after the priests began to plan the evacuation of the refugees. Even after this

regulation became effective, it was not published. Because the priests were in Cuba negotiating the release of the refugees when the regulation was announced by the Coast Guard, they were unable to hear the Coast Guard's radio broadcast, which were being "jammed and garbled by Cuba." **Frade**, 709 F.2d at 1294.

In short, the **Frade** court found that the priests had made extensive efforts to publicize their boatlift, had asked for advice as to the lifts' legality from government officials and legislators, and were not able to learn of the existence of the regulation that actually made their conduct illegal.

By contrast with the defendants in **Frade**, Tran did not act openly but surreptitiously. The price of rice, Tran's long experience with Vietnamese trade, and Tran's stated

awareness that trade with Vietnam was subject to "barriers" allow a reasonable juror to conclude that Tran knew that the rice transactions that he was arranging were illegal. Finally, and most importantly, the regulations prohibiting the transaction arranged by Bao Tran were published and available for inspection.

AFFIRMED.

APPENDIX B

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

GUY WILLARD TOOKER, BAO TRAN, ROY JOHN SCOTT, ROBERT C. DeBROPHY,
Defendants-Appellants.

NO. 91-2148

United States Court of Appeals,
Fifth Circuit

May 8, 1992

Appeal from the United States District Court for the Southern District of Texas, Sim Lake, Judge

ON PETITION FOR REHEARING AND AND SUGGESTION FOR REHEARING EN BANC

(Opinion March 30, 1992, 5th Cir., 1992, 957 F.2d 1209)

Before REAVLEY, HIGGINBOTHAM, and DeMOSS, Circuit Judges.

PER CURIAM:

Tooker, Bao Tran, Scott, and DeBrophy, appellants, all petition the court for a

rehearing. The petitioner's arguments were all made in the original briefs to this court, and we reject them for the reasons stated in the panel opinion.

Petitioners point out a transposition in the original panel opinion. The opinion states:

> Both DeBrophy and Scott contend that, because their letter of intent to Gessner described an agreement to sell Gessner 'Basmati rice,' there is not evidence that either intended to sell Vietnamese rice in violation of the law.

United States v. Tooker, 957 F.2d 1209, 1216 (5th Cir. 1992) (emphasis added). This passage transposed DeBrophy's and Scott's names with Gessner's. Accordingly, the sentence should be altered to read:

> Both DeBrophy and Scott contend that, because Gessner's letter of intent to DeBrophy and Scott described an agreement to sell Gessner 'Basmati rice,' there is no evidence that either DeBrophy or Scott intended to sell Vietnamese rice in violation of the

law.

This typographical error has no effect on the court's reasoning or result. The appellants' petition is meritless.

The court's opinion will be AMENDED as specified in this order. The petitions for rehearing are DENIED and no member of this panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS

(JUDGMENT IN A CRIMINAL CASE (For Offenses Committed On Or After November 1, 1987).

UNITED STATES OF AMERICA

v.

GUY WILLARD TOOKER

CASE NO. H-90-00164-04

Ronald Waska
Defendant's Attorney

THE DEFENDANT:

__ pleaded guilty to count(s)_____

__ was found guilty on count(s) 1_____ after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Sec.	Nature of Offense	Date of Offense
18 USC 371 371; 50 App. 5(b),	Conspiracy to violate the Trading with the Enemy Act,	3/15/90

31CFR 500. promulgated pursuant
201, 500. to Vietnam.
204, 500.701,
505.10

Count
Number(s)
1

The defendant is sentenced as provided in pages 2 through 4 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

__ The defendant has been found not guilty on count 2 and is discharged as to such count(s).

__ Count(s) _____ (is) (are) dismissed on the motion of the United States.

__ It is ordered that the defendant shall pay a special assessment of $ 50 , for count(s) 1 , which shall be due x immediately ___ as follows: CLERK UNITED STATES DISTRICT COURT, ATTENTION: Finance, P.O. Box 601010, Houston, Texas 77208.

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until

all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. UNITED STATES ATTORNEY'S OFFICE, Financial Litigation Unit, P. O. Box 61129, Houston, Texas 77208.

Defendant's Soc. Sec. No.: 446-18-4129

Defendant's Date of Birth: March 15, 1926

Defendant's Mailing Address:

1002 Chantilly Lane

Houston, Texas 77018

Defendant's Residence Address:

1002 Chantilly Lane

Houston, Texas 77018

January 18, 1991
Date of Imposition of Sentence

/s/
Signature of Judicial Officer
SIM LAKE

UNITED STATES DISTRICT JUDGE
Name & Title of Judicial Officer

January 31, 1991
Date

Defendant: GUY WILLARD TOOKER Judgment Case Number: H-90-00154-04 Page 2 of 4

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of one(1) YEAR .

__ The court makes the following recommendations to the Bureau of Prisons: None.

__ The defendant is remanded to the custody of the United States marshal.

__ at ___ a.m. / p.m. on _____.

__ as notified by the United States marshal.

x The defendant shall surrender for service at the institution designated by the Bureau of Prisons,

__ before 2 p.m. on _____.

x as notified by the United States marshal.

__ as notified by the probation office.

RETURN

I have executed this judgment as follows:

Defendant delivered on ___ to _____ at _____, with certified copy of this judgment.

_____
United States Marshal

By _____
Deputy Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of two (2) years.

While on supervised release, the defendant shall not commit another federal, state, or local crime and shall not illegally possess a controlled substance. The defendant shall comply the standard conditions that have been adopted by this court (set forth below). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

X The defendant shall report in person to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

X The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.

X The defendant shall not possess a firearm or destructive device.

The defendant is required to provide the probation officer access to any requested financial information.

The defendant is prohibited from incurring new credit charges or opening new lines of credit without the approval of the probation officer, unless the defendant is in compliance with his payment schedule.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this judgment, the defendant shall not commit another federal, state or local crime. In addition:

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer as directed by the court or probation officer and shall

submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer within 72 hours of any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

Defendant: GUY WILLARD TOOKER Judgment
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FINE

The defendant shall pay a fine of $119,306.36. The fine includes any costs of incarceration and/or supervision.

__ This amount is the total of the fines imposed on individual counts, as follows:

Payable to: Clerk, United States District Court, Attention: Finance, P. O. Box 61010, Houston, Texas 77208.

__ The court has determined that the defendant does not have the ability to pay interest. It is ordered that:

__ The interest requirement is waived.

__ The interest requirement is modified as follows:

This fine plus any interest required shall be paid:

__ in full immediately.

x in full not later than 30 days from sentencing.

X in equal monthly installments over a period of ____ months. The first payment is due on the date of this judgment. Subsequent payments are due monthly thereafter.

__ in installments according to the following schedule of payments:

APPROVED AS TO FORM: J.D.

If the fine is not paid, the court may sentence the defendant to any sentence which might have been originally imposed. See 18 U.S.C. Sec. 3614.